88-337

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

PIERCE COUNTY DISTRICT COURT PROBATION OFFICE, an agency of Pierce County, a municipal corporation of the State of Washington, HONORABLE RUDOLF TOLLEFSON, and ELAINE McNALLY,

Petitioners,

vs.

JEAN ELLIOTT, BRENDA POOLE, DIANE G. WARNER, LARRY PIERCE and JULIA FORSBERG,

Respondents.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Where a county probation office and its officers filed a timely notice of appeal under FRAP 4(a)(1) from a judgment entered against them for $460,436.00 and jurisdiction was thereafter validly lodged in and exercised by the Court of Appeals, did the County lose its right to appeal the judgment under FRAP 4(A)(4) because plaintiffs filed a timely post-trial motion for additional equitable relief and the County did not refile its appeal after the trial court ruled on the motion?

2. Is an appellant deprived of its timely and valid appeal under FRAP 4(a)(1) when a subsequent motion for equitable relief, which is not denominated as any of the motions referred to in FRAP 4(a)(4), is made thereafter but before ten days have elapsed from the entry of judgment?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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PIERCE COUNTY DISTRICT COURT PROBATION OFFICE, an agency of Pierce County, a municipal corporation of the State of Washington, JUDGE RUDOLF TOLLEFSON, and ELAINE McNALLY,

Petitioners,

vs.

JEAN ELLIOTT, BRENDA POOLE, DIANE G. WARNER, LARRY PIERCE and JULIA FORSBERG,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Pierce County District Court Probation Office, Elaine McNally, and Judge Rudolph Tollefson, respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on April 4, 1988 and May 25, 1988.

## OPINIONS BELOW

No opinion was issued by the Court of Appeals. The orders of the Court of Appeals dismissing Petitioners' appeal and denying their petition for rehearing have not been published and are reprinted in the appendix hereto, p. 1a, infra.

## JURISDICTION

Respondents' action was brought in the United States District Court for the Western District of Washington under 42 U.S.C., Section 1983 and the doctrine of pendent jurisdiction. Judgment was entered for Respondents on December 15, 1986 and Petitioners filed a notice of appeal on December 24, 1986.

On April 4, 1988, a panel of the Court of Appeals for the Ninth Circuit entered an order dismissing the appeal. Petitioners' timely petition for rehearing was filed on April 15, 1988 and denied on May 25, 1988.

The jurisdiction of this Court to

review the judgment of the Ninth Circuit is invoked under 28 U.S.C., Section 1254(1).

## RULE INVOLVED

Federal Rule of Appellate Procedure 4(a)

1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of apppeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United Sates or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such an entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new

trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after the expiration of the prescribed time shall be given to the other parties in accordance

with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

## STATEMENT OF THE CASE

This was an action by five employees of the Pierce County District Court Probation Office, an agency of Pierce County, Washington, against the Probation Office, the employees' immediate supervisor, Elaine McNally, and one of the district court judges having ultimate authority over the Probation Office. ER 112-114. Plaintiffs claimed that Ms. McNally and Judge Tollefson had violated their freedom of expression, denied them due process and injured their reputations

by imposing discipline for criticizing Ms. McNally's operation of the office to her superiors, the district court judges. ER 115-121. The defendants (hereinafter "County") denied that any of the plaintiffs had been disciplined because of their statements and contended also that, in the context of the intimate relations between the probation officers and their immediate supervisor, the plaintiffs' speech was not protected under Connick v. Myers, 461 U.S. 138 (1983). ER 117-121. At trial, Judge Tanner sua sponte entered a plaintiffs' directed verdict, ruling that plaintiffs' First Amendment rights had been violated. ER 53. After five days of deliberation, the jury returned a verdict for the plaintiffs and judgment was entered on that verdict in the total amount of $460,436.00 on December 15, 1986. ER 5, 111.

Pierce County, Ms. McNally and Judge Tollefson appealed on December 24, 1986.

On December 26, 1986, the Plaintiffs filed a "motion for equitable relief" seeking, inter alia, reinstatement for some of the employees and expungement of records. ER 6. On December 31, 1986, Plaintiffs also filed a cross-appeal from the judgment entered on December 15, 1986.

On March 19, 1987, a pre-briefing conference was held by telephone among a Ninth Circuit Conference Attorney and counsel for Petitioners and Respondents. In the course of that discussion, the conference attorney raised a concern that the appeal and cross-appeal from the December 15, 1986 judgment were premature, but she also indicated that the appeals might be salvageable if they were still in the Court of Appeals when the motion for equitable relief was ruled upon. ER 54, 25, 18-19. The Court of Appeals then issued two orders, one on March 19, 1987 and one on May 13, 1986 retaining jurisdiction of the case and staying the

appeal pending receipt of the reporter's transcript of the trial, which counsel for the County was directed to pursue. ER 69, 74.

On September 10, 1987, the District Court entered an order granting some of the equitable relief sought by respondents, but stayed its ruling "pending resolution of this matter currently on appeal before the United States Court of Appeals for the Ninth Circuit." ER 62.

Because the Order stayed itself pending resolution not of an appeal from the Order, but of an appeal from an earlier judgment "currently on appeal," the Order was interpreted by County counsel as interlocutory and non-final. ER 46. They concluded that the District Court's decision was tentative, depending upon the outcome of the Ninth Circuit's resolution of the substantive legal issues implicated by the December 15, 1986

judgment. Ibid.

County counsel thus concluded that there was no need to appeal the Order and indeed that it could not be appealed because it was not final. It did not occur to them that there was a need to refile the original appeal from the December 15, 1986 judgment in light of the Court's reference to the appeal in the Ninth Circuit as a pending one and the Ninth Circuit's own retention of jurisdiction. Ibid; ER 54-55.[1]

On December 23, 1987, the Court of Appeals entered an Order directing the parties to submit memoranda addressing jurisdictional issues in the case.

On April 4, 1988 the Court of Appeals for the Ninth Circuit dismissed the

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1. A subsequent review of the file led them to file a timely motion to extend the time for filing an appeal. FRAP 4(a)(5). The trial court denied this motion and it is currently on appeal.

County's appeal and respondent's cross-appeal. The County then petitioned for rehearing on April 15, 1988. The petition was denied on May 25, 1988.

The Ninth Circuit panel which dismissed the County's appeal did not issue an opinion. Its Order states only that the Court finds that the notice of appeal was "invalid" and "of no effect," citing FRAP 4(a)(4) and dismisses for lack of jurisdiction, citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) and Trinidad Corp. v. Maru, 781 F.2d 1360 (9th Cir., 1986).

The Trinidad case did not deal with the issues involved in this case, because there the Notice of Appeal that was invalidated had been filed after a timely FRAP 4(a)(4) motion. In addition, the Trinidad case's reasoning is extremely limited, relying entirely on the opinion of the Supreme Court in Griggs.

The Griggs case does state squarely that Rule 4(a)(4) does invalidate a notice of appeal which is filed before a timely FRAP 4(a)(4) motion. However, the facts in Griggs did not raise that question. The notice of appeal in Griggs was filed after a motion to vacate (or amend) had been made. Accordingly, the Griggs language which is applicable to the facts of the County's case is dictum.

The Court in Griggs did not have before it the arguments that are set forth below. The Court concentrated on the purpose of the 1979 Amendments to the Federal Rules of Appellate Procedure, but it did not consider how the rule might appear to a reasonable lawyer who consults it or the fact that, as it is applied to a notice of appeal validly filed under FRAP 4(a)(1), the construction creates a serious trap which may be inconsistent with principles of modern procedural jurisprudence.

## REASONS FOR GRANTING THE WRIT

### FRAP 4 Was Construed By the Ninth Circuit To Create A Trap That Has Seriously Injured a County Government And, Because The Ninth Circuit's Decision May Have Been Based Not On The Merits But On The Dictum Of The Griggs Case, Only A Decision By This Court Can Insure That The County Has At Least One Full And Fair Hearing On Whether The Rule Should Be Interpreted In This Way.

The interpretation of FRAP 4(a)(4) adopted by the Court of Appeals creates a trap which is inconsistent with twentieth century conceptions of justice and common sense.

Courts of Appeal around the country have been so concerned about avoiding this trap that they have directed their clerks and lower courts to notify litigants who have filed an initial appeal to file again once an FRAP 4(a)(4) motion has been disposed of. Archer v. Lynaugh, 821 F.2d 1094, 1097 (5th Cir. 1987); Neu Cheese v. Federal Deposit Ins. Co., 825 F.2d 1270 (8th Cir. 1987).

Professor Moore warned against this trap in his authoritative treatise.

It might be argued that the treatment of this aspect of the problem of prematurity [by FRAP 4(a)(4)] is a retreat to older and more rigid concepts, and unless the new role of the Court of Appeals in the management of their dockets is actually fulfilled, Rule 4(a)(4) may prove to be troublesome . . . Since the problem can arise only in the case of a timely motion, and the time limit under all the subject Rules is 10 days, if the clerk of the district court notified the court of appeals in the rare case in which a notice of appeal is filed before the filing of a timely post-trial motion, the fact that the notice of appeal is rendered a nullity will be apparent. Since at this point the appeal will appear on the docket of the court of appeals, it should be got off, and if this is done by entering an order dismissing it, a copy of the order will be sent to the appellant under Rule 45(e) and he will be on notice that he has no appeal pending. A boiler plate order that informed the appellant that even if the motion is denied, he must file a new notice of appeal within the prescribed time could be easily designed . . . Thus a minimum exercise of the docket management function contemplated by the Rules as amended in 1979

> ought to prevent a situation in which the jurisdictional character of Rule 4(a)(4) is put to test."

9 Moore, Federal Courts, para. 204.14, p. 4-120.

In this case, however, none of the court personnel acted as Moore describes: the appeal was not dismissed; the petitioners were not notified that they had to refile. The danger of such a default militates in favor of construing the Rule so that it does not apply to an appeal that was valid at the time the post-trial motion was filed.

No one expects a lawyer to know every rule in the rule books of the jurisdictions in which he or she practices. Except for the few lawyers who have had occasion to consult both FRAP 4(A)(1) and 4(a)(4) frequently, the lawyer who wants to appeal from a judgment entered against his client in a federal district court will have to consult the rules.

When he does so he will quickly come

to the language of FRAP 4(a)(1). That rule tells him of the familiar requirement that a notice of appeal must be filed within thirty days of the entry of judgment. There is nothing in FRAP 4(a)(1) which even hints that he will ever have to do anything more than satisfy this requirement.

The rule could have been framed differently. It could have said "Except as provided in 4(a)(4) an appeal is timely if filed within thirty days of the entry of judgment." It could have said that "the provisions of this rule are not applicable where any of the motions described in 4(a)(4) are timely made and the requirements of that rule shall apply in such a case." Or 4(a)(1) could simply have said, "But see 4(a)(4)".

The rule does none of these things - or anything else that would put a lawyer on notice that his appeal could be invalidated by operation of law at some time in the future.

It gives him no reason to look further and review the entirety of Rule 4. It lulls him into a false sense of security -- the hallmark of an effective trap.

When the motion is made, there is no occasion for the lawyer to look at Rule 4 again. He knows he has validly filed his appeal and has no reason to believe that the motion has any effect on it. It cannot be suprising that he would have no idea that by the mere filing of that motion an appeal authorized by and valid under 4(a)(1) has become a nullity.

Similarly, once the motion has been disposed of, there may be no reason for the lawyer to review Rule 4 and check it out in its entirety. If the lawyer does not intend to appeal from the order disposing of the motion and is content with appealing solely from the earlier judgment, there is no reason to go back to the rules to see how they apply to the

order.

If Rule 4(a)(4) were, in fact, consulted, it would probably provide proper guidance to many attorneys, but it also might mislead many.

Although it can be construed more broadly, it is directed not to the situation in which there is an existing valid appeal at the time the post-judgment motion is made, but to the situation where the motion was made first and the appeal was never valid.

The Rule says that:

> A notice of appeal filed before the disposition of any of the above motions shall have no effect.

Literally, this cannot have in mind an appeal filed before the making "of any of the above motions," because such an appeal necessarily has effect -- it immediately transfers the case to the Court of Appeals and deprives the district court of jurisdiction.

Because of Rule 4(a)(1), the only

appeals that can be described as having no effect are those filed after the motions referred to in 4(a)(4). To be sure, 4(a)(4) can be construed to deprive a 4(a)(1) appeal of effect. But that requires an inference; the Court must choose to adopt that construction.

If that construction was meant, the rule should have said:

> A notice of appeal filed before the disposition of any of the above motions shall have no effect or shall be deprived of effect.

Rule 4(a)(4) creates another problem because it is not clear in its reference. It speaks of the "time for apeal," but it does not specify which appeal it means. It conceivably could be talking only about an appeal from the order disposing of the post-trial motion. A lawyer could think that the time for appeal from the judgment is specified in 4(a)(1) and the time for appealing subsequent orders is specified in 4(a)(4) -- particularly if the order in

his case is not one that changes any of the terms of the original judgment.

The County of Pierce contends that a procedural rule should not be construed to create a trap, that there is sufficient room in the language of 4(a)(1) and 4(a)(4) to construe it so that it does not destroy an appeal which was valid when filed. It believes it is entitled to have a Court consider its contention that the administrative purposes served by the reading of Rule 4 adopted in the Court of Appeals do not justify the draconian consequences of such a reading. Construing the rule not to apply in the unusual case where an appeal is filed before a timely post-trial motion cannot substantially interfere with the administration of appeals, especially since once this Court so rules, it will be easy enough to re-write Rule 4 so that it does not create the trap that exists now. To uphold the formalistic approach of the

Court of Appeals' decision, on the other hand, is to revive nineteenth century procedural jurisprudence.

This Court has never repudiated its declaration that decisions on the merits should not be avoided on the basis of mere technicalities. Foman v. Davis, 371 U.S. 178, 9 L. Ed.2d 222, 83 S.Ct. 227 (1962). The general rule is that statutes giving a right of appeal are liberally construed and that an interpretation that will work a forfeiture of that right is not favored. 3 Sutherland, Statutory Interpretation, Section 6708, p. 237 (Sands ed. 1974).

> . . . Provisions limiting the time for bringing an appeal are liberally interpreted so that the party pursuing the remedy of appeal will not be defeated on mere technicalities.

In re Hurley, 56 F.2d 1023 (5th Cir. 1932). See, e.g., Comfort Trane Air Conditioning Co. v. Trane Co., 592 F.2d 1373 (5th Cir. 1979).

It is not clear that the Court of Appeals gave these considerations the attention they deserve and it is likely that no other court will because it will feel bound by the dictum in the Griggs case.

The Court of Appeals did not render an opinion below. Its order stated no more than the following:

> Pursuant to this court's December 23, 1987 order, the parties have briefed the issue whether this court has jurisdiction over these appeals. The court finds that the notice of appeal and cross-appeal in case Nos. 87-3515 and 87-3551 are invalid and have no effect. Fed. R. App. P 4(a)(4). Accordingly, these cases are dismissed for lack of jurisdiction. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982); Trinidad Corp. v. Maru, 781 F.2d 1360 (9th Cir. 1986).

The cases cited, Griggs and Trinidad Corp. v. Maru, were cases in which the post-judgment motion was made before the initial appeal was filed. They are thus not authority for a case where the appeal

was filed before the motion in question.[2]

But the Court of Appeals treated them as though they were authority, no doubt because the Griggs opinion was so definite and sweeping in its language.

This Court has never had the opportunity to consider a case in which 4(a)(4) has been used to invalidate an appeal valid when filed. A panel of the Ninth Circuit has done so, but it is not clear that it fully considered the relevant factors because of the Griggs dictum. In addition, because of the Griggs case, it is likely that no other Court of Appeal will ever decide a case such as this one on its merits.

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2. The Trinidad case is actually authority in support of Petitioners' appeal because the Trinidad court states that "the effect of the notice of appeal is determined at the time it is filed." 781 F.2d at 1362. Obviously, if the effect of the notice of appeal filed by the County were determined at the time it was filed, that notice would be valid and the Court of Appeals' dismissal would have to be overturned.

Thus, if the issues are ever to be decided on the basis of a proper record and on the merits, they probably must be decided by this Court in this case.

In addition, if the County of Pierce is to have its full and fair day in court on the issue, it appears that only this Court can assure that that has occurred.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| JEAN ELLIOTT, et al., | |
| Plaintiffs-Appellees | NO. 87-3515<br>87-3551 |
| vs. | DC# CV-85-1316-JET<br>Western Washington<br>(Tacoma) |
| PIERCE COUNTY DISTRICT COURT PROBATION OFFICE, et al., | ORDER |
| Defendants-Appellants. | |

Before: CANBY, BEEZER and KOZINSKI,
Circuit Judges

Pursuant to this court's December 23, 1987 order, the parties have briefed the issue whether this court has jurisdiction over these appeals. The court finds that the notice of appeal and cross-appeal in case Nos. 87-3515 and 87-3551 are invalid and have no effect. Fed. R. App. P 4(a)(4). Accordingly, these cases are dismissed for lack of jurisdiction. Griggs vs. Provident Consumer Discount Co., 459 U.S. 56 (1982); Trinidad Corp. vs. Maru, 781 F.2d 1360 (9th Cir. 1986).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| JEAN ELLIOTT, et al., Plaintiffs-Appellees vs. PIERCE COUNTY DISTRICT COURT PROBATION OFFICE, et al., Defendants-Appellants. | NO. 87-3515<br>87-3551<br>DC# CV-85-1316-JET<br>Western Washington<br>(Tacoma)<br>ORDER |

Before: CANBY, BEEZER and KOZINSKI,
Circuit Judges

Appellants' petition for rehearing, filed April 15, 1988, is denied.